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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1976

No. 76-194

THE HONORABLE GEORGE W. WHITE, Judge of the
Court of Common Pleas of Cuyahoga County,
Appellant,

vs.

THE STATE OF OHIO on Relation of JOHN T.
CORRIGAN, Prosecuting Attorney of Cuyahoga
County, Ohio,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF OHIO

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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STATEMENT OF THE CASE

The appellant relies upon, and incorporates herein by reference, the Statement of the Case contained in the Jurisdictional Statement.

ARGUMENT

I. THE APPELLEE'S MOTION TO DISMISS FAILS TO ADDRESS ITSELF TO THE JURISDICTIONAL GROUNDS SET FORTH BY THE APPELLANT AND THEREFORE MUST BE DENIED.

In his Motion to Dismiss, the appellee raises two objections to this Court's jurisdiction, the first, that since the appellant has not challenged the Ohio Supreme Court's interpretation of OHIO CONST. Art. IV, §1, and OHIO R. CRIM. P. 52(B) on due process grounds, no appeal will lie; and second, that the appellant's first issue presented was not raised below, thus precluding review by this Court.

A. The Appellee's Assertions Regarding Due Process and the Adequacy of the Independent State Grounds for the Decision Below Are Inapposite to the Issues Presented in the Instant Case.

The appellant agrees with the appellee's threshold contention that a state procedural rule which comports with due process and advances a legitimate state interest will not be declared unconstitutional on Fourteenth Amendment due process grounds. *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Henry v. Mississippi*, 379 U.S. 443 (1965). However, the appellee then proceeds to expand upon this doctrine to a point where he claims that the Fourteenth Amendment's due process clause constitutes the only basis for a constitutional challenge to a state law. Then the appellee states that since the appellant has not based his appeal upon due process, no jurisdictional grounds exist. No such constitutional mandate has ever been handed down by this Court, and innumerable decisions exist to the contrary. See e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

The appellant has challenged the constitutionality of the Ohio Supreme Court's interpretation of OHIO CONST. Art. IV, §1, and OHIO R. CRIM. P. 52(B) under the supremacy clause, UNITED STATES CONST. Art. VI, cl. 2, which raises considerations vastly different from the principles of due process discussed in *Johnson v. New Jersey*, *supra*, and *Black v. Cutter Laboratories*, 351 U.S. 292 (1956), cited by the appellee. These two cases neither affect in any way the substance of the issues presented for this Court's review, nor do they buttress the appellee's assertion that only the due process clause can be relied upon for jurisdiction in this Court.

By grounding his motion to dismiss upon theories of adequate state grounds under the due process clause, the appellee has apparently confused a defendant's right to due process of law, and the individual guarantees embodied within that concept, with the primary obligation of a state court judge to abide by constitutional mandate. The exercise of a defendant's federal due process rights can be regulated by the state within strict constitutional parameters, and those rights can even be knowingly, voluntarily and intelligently waived by the defendant's unilateral decision. However, a judge cannot unilaterally abridge or ignore the duty of fidelity placed upon him by the United States Constitution, nor can the state, by constitution, statute or procedural rule, impede or detract from that judge's ability to fulfill his constitutional obligation. *Cooper v. Aaron*, 358 U.S. 1, 16-19 (1958).

Thus, the appellee's assertions are completely unrelated to the jurisdictional grounds raised by the appellant, and therefore cannot rationally support the contention that this Court is without jurisdiction over the instant case.

B. The Appellee's Assertions Regarding the Timeliness With Which the First Issue Presented Was Raised Are Inapposite to the Instant Case.

The appellee's second submission in support of his motion to dismiss alleges that the appellant failed to raise his first issue presented in a timely fashion. However, it is clear from the facts previously related that this issue was raised at the first opportunity, upon the appellant's motion for reconsideration in the Supreme Court of Ohio, and that this issue was in fact created by the Ohio Supreme Court's first, unprecedented decision in the instant case.

Herndon v. Georgia, 295 U.S. 441 (1935), cited by the appellee, in reality supports the appellant's position. *Herndon* specifically recognized the exception to the general jurisdictional rule herein in issue, *Herndon, supra*, at 443-444, and then held that the facts in that case did not fit within the exception, because the Georgia Supreme Court had issued a similar ruling several months prior to the decision therein being challenged, *Herndon, supra*, at 444-446.

As the appellant has previously stated, the Supreme Court of Ohio's decision in the instant case was without precedent, totally unforeseeable and raised issues not previously addressed by the parties. The appellee has been unable to provide this Court with any authority to the contrary. Therefore, the propriety of the manner in which the appellant has raised this issue cannot be seriously challenged and the issue is not subject to dismissal on the grounds asserted by the appellee.

II. THE APPELLEE HAS FAILED TO CHALLENGE THIS COURT'S JURISDICTION OVER THE APPELLANT'S SECOND ISSUE PRESENTED.

It must be noted that the appellee's two assertions discussed above both appear to be directed to the appellant's first issue presented, thus leaving this Court's jurisdiction over the second issue unchallenged.

CONCLUSION

For the foregoing reasons, the appellant respectfully requests that this Honorable Court deny the appellee's motion to dismiss and accept jurisdiction over the instant appeal.

Respectfully submitted,

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